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No. 98 - 669

In The
Supreme Court of the United States
October Term, 1998

LEVITON MANUFACTURING CO., INC.,
Petitioner,
v.
RHODE ISLAND INSURERS' INSOLVENCY FUND,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF RHODE ISLAND

BRIEF OF AMICUS CURIAE NEW ENGLAND LEGAL FOUNDATION IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

1. Whether the Rhode Island Supreme Court erred in concluding that the 1988 amendment of Rhode Island Insurers' Insolvency Fund law, which imposed a new duty on Leviton Manufacturing Company, was not retroactive legislation.

2. Whether the retroactive application of the 1988 amendment of the Rhode Island Insurers' Insolvency Fund law to claims that arose in 1983-1986 violates the Due Process Clause.

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INTEREST OF AMICUS CURIAE

The New England Legal Foundation ("NELF"), a non-profit, public interest law firm, was incorporated in 1977.[1] Its membership consists of corporations, individuals, and others who believe in promoting balanced economic growth for New England, protecting the free enterprise system and defending

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1. Pursuant to Supreme Court Rule 37.6, counsel for *Amicus* states that neither counsel for Petitioner nor Respondent authored this brief in whole or in part and no person or entity other than *Amicus* made a monetary contribution to the preparation or submission of the brief.

economic rights. NELF's more than 130 members and supporters include a cross-section of large and small corporations from all parts of New England and the United States. NELF has regularly appeared in state and federal court, as party or counsel, in cases raising issues of general economic significance to the business community. See, e.g., Lockheed Corp. v. Spink, 517 U.S. 882(1996); BMW v. Gore, 517 U.S. 559 (1996); Reich v. Southern New England Telecommunications Corp., 121 F.3d 58 (2d Cir. 1997); Cigna Health Plan of Louisiana v. Louisiana, 82 F.3d 642 (5th Cir. 1996); Georgine v. Amchem Products, Inc., 83 F.3d 610 (3d Cir. 1996); Conservation Law Foundation v. Department of the Air Force, 79 F.3d 1250 (1st Cir. 1996); Preseault v. United States, 66 F.3d 1167 (Fed. Cir. 1995); Eastern Mountain Platform Tennis, Inc. v. Sherwin-Williams Co., 40 F.3d 492 (1st Cir. 1994); B.F. Goodrich Co. v. Murtha, 958 F.2d 1192 (2d Cir. 1992); International Paper Co. v. Town of Jay, 665 A.2d 998 (Me. 1995); O'Brien v. New England Telephone & Telegraph Co., 422 Mass. 686, 664 N.E.2d 743 (1996).

NELF seeks to bring to the Court's attention its views on the importance of the constraints imposed by the Due Process Clause on retroactive economic legislation. Retroactive economic legislation, like the recoupment provision at issue in Leviton's Petition, not only upsets settled expectations but also destroys a company's ability to engage in sound financial planning. As this case demonstrates, it is fundamentally unfair to impose severe financial burdens on businesses after they have, in good faith, complied with and relied on existing law.

Pursuant to Supreme Court Rule 37.2, counsel for *Amicus*, who are employed by the New England Legal Foundation, have secured written consent for the filing of this brief from counsel for Petitioner and Respondent.

STATEMENT OF THE CASE

Amicus accepts and adopts the Petitioner Leviton Manufacturing Co., Inc.'s Statement of the Case. *See* Leviton Manufacturing Co., Inc.'s Petition for Writ of Certiorari ("Writ") at 2-7.

SUMMARY OF ARGUMENT

The Rhode Island Supreme Court erroneously concluded that the recoupment provision added to the Rhode Island Insurers' Insolvency Fund law in 1988 was not retroactive legislation as applied to claims that arose in 1983-1986 when the Fund was prohibited from seeking reimbursement from any insureds. The retroactive application of the recoupment provision to Leviton's 1983-1986 workers' compensation claims imposes a severe financial burden on Leviton and imposes a new obligation on Leviton that it could not have anticipated when it purchased insurance coverage. The retroactive application of the recoupment provision to Leviton is fundamentally unfair in violation of the Due Process Clause of the United States Constitution.

ARGUMENT

I. THE RHODE ISLAND SUPREME COURT ERRED IN HOLDING THAT THE 1988 AMENDMENT TO THE RHODE ISLAND INSURERS' INSOLVENCY FUND LAW WAS NOT RETROACTIVE LEGISLATION AS APPLIED TO CLAIMS COVERED BY INSURANCE POLICIES PURCHASED BEFORE ITS ENACTMENT.

A. THE HISTORICAL CONTEXT

Leviton Manufacturing Company ("Leviton") bought

workers' compensation insurance from American Mutual Insurance Company ("American Mutual") from April 1, 1983 to April 1, 1986. Claims were made against those policies which American Mutual paid until its insolvency in March, 1989. When Leviton bought the American Mutual policies, the Rhode Island Insurers' Insolvency Fund (the "Fund") was prohibited from seeking reimbursement from any insureds for any covered claims paid on behalf of the insured. Since 1970 through the dates that Leviton purchased the American Mutual policies, Rhode Island law provided that the Fund "shall have no cause of action against the insured of the insolvent insurer for any sums it has paid out." 1970 R. I. Pub. Laws, ch. 166, § 27-34-8-(f).[2] As the Rhode Island Supreme Court has noted, the Rhode Island legislature designed the Fund "to protect both claimants and policyholders from the catastrophic consequences of an insurer's insolvency." Rhode Island Insurers' Insolvency Fund v. Leviton Manufacturing Co., 716 A.2d 730, 732 (1998).

In 1988, before American Mutual was declared insolvent, the Rhode Island legislature repealed the 1970 Act and enacted 1988 R.I. Pub. Laws, ch. 407, § 2 et seq. (codified at R. I. Gen. Laws § 27-34-1 et seq.) (the "1998 Act"). Under the 1988 Act, the Fund was given the right to recover the amount of claims paid on behalf of insureds having a net worth in excess of $50,000,000 "on December 31 of the year next preceding the date the insurer became an insolvent insurer." R.I. Gen. Laws § 27-34-11 (b) (1) (1988). Leviton's net worth exceeded $50,000,000 on the relevant date. In May, 1993, the Fund brought suit against Leviton to recover the amounts it had

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2. In 1988, the Rhode Island legislature repealed the 1970 Act and replaced it with 1988 R.I. Pub. Laws, ch. 407, § 2 et seq., codified at R.I. Gen. Laws § 27-34-1 et seq.

paid to Leviton's workers under the American Mutual policies. In its answer to the complaint, Leviton asserted affirmative defenses challenging the constitutionality of the 1988 Act as applied to insured claims which arose prior to the Act. Among other defenses, Leviton argued that the 1988 Act violates the Due Process Clause by imposing a retroactive obligation on Leviton for workers' compensation claims that arose in 1983-1986 when the Fund was required to step into the shoes of an insolvent insured and was prohibited from seeking recovery from any Rhode Island insureds.

The trial court granted the Fund's motion for partial summary judgment challenging Leviton's affirmative defenses; the Rhode Island Supreme Court affirmed. Rhode Island Insurers' Insolvency Fund v. Leviton Manufacturing Co., 716 A.2d 730 (1998). The Rhode Island Supreme Court held that the 1988 Act was not retroactive because the event that triggered its application was the 1989 insolvency of American Mutual, not the occurrence of liability under the policies purchased years earlier. Id. at 735. By concluding that the 1988 Act was not applied retroactively, the Court found it "unnecessary . . . to analyze § 27-34-11(b)(1) further with regard to defendants' due process rights." Id. at 736. The Court's conclusion that the 1988 Act, as applied to claims which arose under policies purchased prior to its enactment, is not retroactive is incorrect and produces a result that is harsh and oppressive in violation of the Due Process Clause.

B. APPLYING THE 1998 ACT TO LEVITON FOR EVENTS OCCURRING PRIOR TO ITS ENACTMENT IS RETROACTIVE LEGISLATION.

Under this Court's precedent, including the recent decision in Eastern Enterprises v. Apfel, __ U.S. __, 118 S. Ct. 2131 (1998), the 1988 Act, as applied to workers'

compensation claims that arose under the 1983-1986 policies, is retroactive legislation. To determine whether a statute operates retroactively "the court must ask whether the new provision attaches new legal consequences to events completed before its enactment." Landgraf v. USI Film Products, 511 U.S. 244, 269-70 (1994). As this Court has explained:

> The conclusion that a particular rule operates "retroactively" comes at the end of a process of judgment concerning the nature and extent of the change in the law and the degree of connection between the operation of the new rule and a relevant past event.

Id. at 270. "A law is retrospective if it 'changes the legal consequences of acts completed before its effective date,'" Miller v. Florida, 482 U.S. 423, 430 (1987), or "takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability." Sturges v. Carter, 114 U.S. 511, 519 (1885) (citation omitted). One commentator has explained:

> A retroactive statute is one which gives to preenactment conduct a different legal effect from that which it would have had without the passage of the statute. The most obvious kind of retroactive statute is one which reaches back to attach new legal rights and duties to already completed transactions. However, a statute may be retrospective even if does not purport to have effect prior to its enactment; this is true, for example, of a statute which declares preexisting obligations unenforceable in the future.

Charles B. Hochman, *The Supreme Court and the*

Constitutionality of Retroactive Legislation, 73 Harv. L. Rev. 692, 692 (1960) (footnotes omitted). Under all of these "similar functional conceptions of legislative 'retroactivity,'" Landgraf, 511 U.S. at 269, the 1988 Act, as applied to Leviton in this case, is retroactive legislation.

As noted above, when Leviton purchased workers' compensation insurance in 1983-1986 and when American Mutual incurred liability under those policies, the Fund was prohibited from recovering "against the insured of the insolvent insurer for any sums it has paid out." 1970 R. I. Pub. Laws, ch. 166, § 27-34-8(f). In 1983-1986, there was no reason for Leviton to take additional steps to protect itself and its workers from the prospect of the insolvency of its insurer because the law required the Fund to step into the shoes of an insolvent insurer and pay the claimants without recourse against Leviton.

With the passage of the 1988 Act, a new obligation was placed on Leviton that it did not have before: Leviton became a self-insurer in the event its insurer became insolvent. This unexpected new duty or obligation, of which it had no notice when it purchased the policies in 1983-1986, was imposed not only for future workers' compensation claims, for which Leviton could take steps to protect itself against the possible insolvency of its insurer, but also for past claims against which Leviton could no longer insure. Moreover, the Fund's "preexisting obligation" to step into the shoes of insolvent insurers, on which Leviton and others relied in planning their affairs, was declared "unenforceable in the future." Hochman, supra, 73 Harv. L. Rev. at 692. As applied to Leviton's liability for the workers' compensation claims covered by the 1983-1986 policies, the 1988 Act is retroactive.

II. THE RETROACTIVE APPLICATION OF THE 1988 ACT TO LEVITON VIOLATES THE DUE PROCESS CLAUSE.

All members of this Court agreed in Eastern Enterprises that "[r]etroactivity is generally disfavored in the law . . . in accordance with 'fundamental notions of justice' that have been recognized throughout history." 118 S. Ct. at 2151 (plurality opinion) (citations omitted). See id. at 2158 (Kennedy, J., concurring) (noting "disfavor of retroactive economic legislation"); id. at 2163 (Breyer, J., dissenting) ("an unfair retroactive assessment of liability upsets settled expectations"). "The principle that the legal effect of conduct should ordinarily be assessed under the law that existed when the conduct took place has timeless and universal appeal," Kaiser Aluminium & Chemical Corp. v. Bonjorno, 494 U.S. 827, 255 (1990) (Scalia, J., concurring), and "has long been a solid foundation of American law." Id. This Court has noted that

> [r]etroactive legislation presents problems of unfairness that are more serious than those posed by prospective legislation, because it can deprive citizens of legitimate expectations and upset settled transactions.

General Motors Corp. v. Romein, 503 U.S. 181, 191 (1992). Moreover, "a person should be able to plan his conduct with reasonable certainty of the legal consequences." Hochman, supra, 73 Harv. L. Rev. at 692. "[T]o the extent that statutory law should serve as a guide to individual conduct, this purpose is thwarted by retroactive enactments." Id. at 693. Accordingly, "retroactive legislation does have to meet a burden not faced by legislation that has only future effects." Pension Benefit Guaranty Corp. v. R. A. Gray & Co., 467 U.S. 717, 730 (1984). "The retroactive aspects of legislation, as well as the prospective aspects, must meet the test of due process, and the

justifications for the latter may not suffice for the former." Usery v. Turner Elkhorn Mining Co., 428 U.S. 1, 17 (1976).

While economic legislation comes "to the Court with a presumption of constitutionality," id. at 15, the Court's

> decisions, however, have left open the possibility that legislation might be unconstitutional if it imposes severe retroactive liability on a limited class of parties that could not have anticipated the liability, and the extent of that liability is substantially disproportionate to the parties' experience.

Eastern Enterprises, 118 S. Ct. at 2149.

A majority of this Court agreed in Eastern Enterprises that the Due Process Clause affords protection against retroactive legislation. Id. at 2158-59 (Kennedy, J., concurring); id. at 2163-64 (Breyer, J., concurring). Justice Breyer explained:

> To find that the Due Process Clause protects against this kind of fundamental unfairness -- that it protects against an unfair allocation of public burdens through this kind of specially arbitrary retrospective means -- is to read the Clause in light of a basic purpose: the *fair application of law*, which purpose hearkens back to the Magna Carta.

Id. at 2164 (emphasis in original). As summarized by Justice Kennedy, "due process requires an inquiry into whether in enacting the retroactive law the legislature acted in an arbitrary and irrational way." Id. at 2158. The question is whether "the

law before us is fundamentally unfair or unjust." Id. at 2164 (Breyer, J., dissenting). "The fairness question is, why Eastern?" Id.

The plurality and Justice Kennedy concluded that the Coal Act, as applied to Eastern, was fundamentally unfair.[3] The plurality reasoned that the Coal Act "has forced a considerable financial burden upon Eastern," id. at 2149, estimating that the total payments Eastern would be required to make would be between $50 and 100 million dollars. Id. The plurality reasoned that this burden was not a "responsibilit[y] that Eastern accepted under any benefit plan the company itself adopted." Id. at 2150. In addition, the plurality noted that Eastern had no control over former employees after Eastern left the coal industry in 1965. Id.

The plurality also found that the Coal Act "substantially interferes with Eastern's reasonable investment-backed expectations" by attaching "new legal consequences to [an employment relationship] completed before its enactment." Id. at 2151 (alteration in original). In addition, the plurality concluded that "the nature of the governmental action in this case is quite unusual." Id. at 2153. While acknowledging that "Congress sought a legislative remedy for what it perceived to be a grave problem in the funding of retired coal miners' health benefits," id., the plurality held that, as to Eastern, that remedy implicated "fundamental fairness":

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3. The dissenting Justices concluded that it was not unfair to apply the Coal Act to Eastern Enterprises "because the relationship between Eastern and the payments demanded by the Act is special enough to pass the Constitution's fundamental fairness test." Id. at 2164.

> When . . . that solution singles out certain employers to bear a burden that is substantial in amount, based on the employers' conduct far in the past, and unrelated to any commitment that the employers made or to any injury they caused, the governmental action implicates fundamental principles of fairness . . . .

Id.

A similar analysis suggests that, as applied retroactively to Leviton's workers' compensation claims that arose in 1983-1986, the 1988 Act is fundamentally unfair. Like the Coal Act, the 1988 Act "singles out certain employers to bear a burden that is substantial in amount." The liability is unrelated to Leviton's conduct because it was created by the 1988 Act and the subsequent insolvency of American Mutual, an event over which Leviton had no control. The 1988 Act also upset Leviton's settled expectations. In 1983-1986, when Leviton purchased workers' compensation insurance from American Mutual, it believed it was protected in the event of its insurer's insolvency because Rhode Island law required the Fund to pay claimants and prohibited the Fund from seeking recoupment from insureds. Accordingly, Leviton did not need to consider whether to take additional steps to protect itself in the event that American Mutual became insolvent. After the 1988 Act was passed and, thereafter, when American Mutual became insolvent in 1989, Leviton was stripped of this protection and became a self-insurer. At that point, Leviton was powerless to protect itself retroactively for the claims that arose years earlier.

Also like the Coal Act, the nature of the governmental action is unusual because the 1988 Act's recoupment provision singles out a small number of companies — those with net worths exceeding $50,000,000 — to lessen the burden on *insurers* who are required by Rhode Island law to contribute to

the Fund through assessments as determined by the Fund. R.I. Gen. Laws § 27-34-9 (1970); R.I. Gen. Laws § 27-34-8 (a) (3). Moreover, the 1988 Act is arbitrary because it does not impose liability retroactively on all insureds based on the benefits they received from the Fund. Rather it singles out those that the legislature apparently believed were in a better position to absorb some of the expenses of the Fund, thus imposing on those few insureds a burden that should properly be borne by all taxpayers, all insureds, or all insurers. It is fundamentally unfair to apply the 1988 Act retroactively to a few companies for claims that arose years before its enactment.

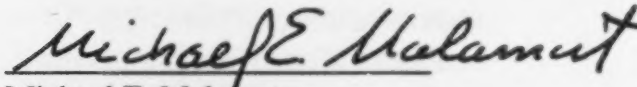
CONCLUSION

For the reasons stated above, this Court should grant the petition for a writ of certiorari.

Respectfully submitted,

New England Legal Foundation

By its attorneys,



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